U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date Issued: July 27, 1998
Case No.: 97-INA-168

In the Matter of:

BETH JACOB HEBREW TEACHERS COLLEGE,
Employer,

on behalf of

JUSTYNA DWORAK,
Alien.

Appearance: Paul Janaszek

Before: Guill, Vittone and Wood
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification[1] filed by a Teachers College for the position of Cook, Kosher. (AF 6-7).[2]

The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. §656.27(c).

STATEMENT OF THE CASE

On November 15, 1994, Beth Jacob Hebrew Teachers College filed an application for alien employment certification on behalf of the Alien, Justyna Dworak, to fill the position of Cook, Kosher. The job required preparation of food according to Kosher dietary requirements and Employer required a minimum of two years experience in the job offered. (AF 7).

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[1]Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2]"AF" is an abbreviation for "Appeal File."

Employer received five applicant referrals in response to its recruitment efforts, four of whom Employer reported were contacted by phone and determined to be not qualified for the job and a fifth whom employer reported was not interested in the job. (AF 47-48).

A Notice of Findings (NOF) was issued by the CO on May 10, 1996, proposing to deny labor certification on the basis that employer had unlawfully rejected apparently qualified U.S. workers. (AF 57-59). Noting that applicants Suleymanov and Fuller appear qualified, the CO advised that both these applicants' post-recruitment follow-up letters contradicted Employer's recruitment report that they were contacted and telephonically "interviewed". The CO reported that both of these applicants stated, separately and independently, that this Employer never contacted them and never interviewed them. In addition, the CO advised that a third U.S. worker, although not qualified, responded to a post-recruitment follow-up letter denying Employer contact. Employer was instructed to provide documentation showing that applicants Suleymanov and Fuller were not qualified, willing or available at the time of initial consideration and referral, and further, establish a position of good faith recruitment by providing evidence that Employer had contacted and interviewed the three U.S. workers cited.

In Rebuttal, Employer asserted good faith in its recruitment and submitted copies of "contemporaneous records" from job interviews with the applicants on the phone, maintaining that not only were they contacted, but also interviewed. Employer reconstructs its interview with each of the applicants cited and contends that each confirmed that they did not have the required minimum two years experience in the performance of the job duties and hence, were not qualified for the job. (AF 60-80).

A Final Determination denying labor certification was issued by the CO on June 20, 1996. (AF 81-83). The CO concluded:

> We find the weight of the available evidence does not support a good faith recruitment effort of U.S. workers. Although we are not raising issues regarding the employer's recruitment report or rebuttal, we do not attach less value to the integrity of three U.S. workers whose statements are identical -- they were not contacted by the employer.
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> As it does not appear that the employer actually interviewed any of the three U.S. workers, two of whom professing qualification, we question how the employer determined that Ms. Suleymanov and Ms. Fuller were not qualified. In light of this, we find that the employer has neither established or proven that these two U.S. workers were qualified or unavailable.

Employer filed a Request for Review of Denial by letter dated July 23, 1996, and thereafter submitted a Brief in Support of Appeal, dated February 14, 1997. (AF 84-104). Noting that Employer was not instructed specifically what evidence would be considered valid to

document that contact with the applicants was made, Employer stated that it considered the records from the interview would be sufficient to overcome the citations in the NOF. Employer submitted copies of its NYNEX telephone bill which itemizes local calls in its Request for Review, noting that Employer was not instructed to submit such documentation and that such documentation was not available at the time of filing rebuttal response, but nonetheless, that these records clearly show contact by the Employer.

DISCUSSION

Pursuant to §656.21(b)(6), an employer is required to document that if U.S. workers applied for the job opportunity, they were rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. Implicit in the regulations is a requirement of good faith recruitment. H.C. LaMarche Ent., Inc. 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1

In the instant case, the CO challenged Employer's good faith in the recruitment of U.S. workers. Hence, Employer was instructed by the CO in the NOF to establish a position of good faith recruitment by providing evidence that Employer had in fact contacted and interviewed the three U.S. workers cited. Faced with a statement that Employer rejected the applicants as unqualified and with a questionnaire indicating that the applicants were not contacted by Employer, the CO properly placed the burden on Employer to substantiate its assertion that the applicants were in fact contacted and unqualified. See, Annette Gibson, 88-INA-396 (June 20, 1989).

Employer's rebuttal entailed contemporaneous summaries of each of the alleged applicant contact and interviews. Where a labor certification regulation does not require information to be in a specific form, and the CO has not made a request for a reasonably obtainable and relevant document, written assertions that are reasonably specific and indicate their sources or bases are to be considered documentation. Gencorp, 87-INA-659 (Jan. 13, 1988) (en banc). The CO is not required to accept written statements provided in lieu of independent documentation as credible or true, but must consider them and give them the weight they rationally deserve. Id. Contemporaneous documentation may be entitled to more weight than statements made long after the events in question. See, La Salsa, Inc., 87-INA-580 (Aug. 29, 1988) (en banc) (holding that CO improperly credited U.S. worker's four-word questionnaire response, prepared five months after the events in question, over the employer's contemporaneous documentary evidence that the U.S. worker could not be contacted).

Here, the CO chose to credit the three U.S. workers' statements, citing the consensus of three identical responses. Notably, one of the U.S. workers responded that he was qualified for the position, despite the CO's determination to the contrary. Given the equivocal nature of the

evidence, we find the CO's determination to credit the U.S. workers on the basis of numerical superiority was reasonable. However, in light of the credibility issue and the CO's emphasis on "integrity" in her determination, we conclude that the CO should have considered the newly submitted evidence with Employer's request for review as a timely motion for reconsideration, and addressed its ramifications, if any. See Palo Alto Elec. Motor Corp., 95-INA-249 (Feb. 3, 1997), citing Harry Tancredi, 88-INA-441 (Dec. 1988) (holding that COs had the inherent authority to reconsider their own decisions). This is so particularly in light of the fact that the CO did not address, but simply discredited, Employer's rebuttal.

The CO did not specify the type of evidence sought, but found employer's contemporaneous records insufficient. The telephone bills itemizing calls to these applicants were not available to Employer at the time of filing its rebuttal. Because these telephone bills add credibility to Employer's rebuttal by further corroborating contact, they should be considered by the CO. (These phone records reflect that a phone call was placed to applicant Suleymanov of ten minutes duration on September 29, 1995, at the number provided on her resume; of eight minutes duration to applicant Fuller on September 29; and to applicant Perry on October 13, 1995). (AF 39, 43, 46, 85-86). Accordingly, the case is remanded for consideration of evidence submitted with Employer's timely reconsideration motion.

ORDER

The Certifying Officer's denial of alien labor certification is hereby **VACATED** and this case is hereby **REMANDED** for **RECONSIDERATION** consistent with this Decision.

SO ORDERED.

For the panel by:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals

800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.